UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPON

MEMORANDUM

SUBJECT: Enforcement of Authorized State Laws Pursuant to 40 CFR Section 271.19 - Formal Comments on State Requirements Applicable to Facility Permits

FROM: Bruce M. Diamond, Director
Office of Waste Programs Enforcement

TO: Hazardous Waste Division Directors
Regions I-X

We have recently had several inquiries into EPA's enforcement capabilities pursuant to 40 CFR Section 271.19(e)(2). That section states "the Regional Administrator may take action under Section 3008(a)(3) of RCRA against a holder of a State-issued permit at any time on the ground that the permittee is not complying with a condition that the Regional Administrator in commenting on the permit application or draft permit stated was necessary to implement approved State program requirements." This section applies whether or not the condition commented on by the Region was included in the final permit. Because Section 271.19 is a very important and little understood provision, we would like to provide some initial guidance on how that section should be interpreted and implemented.

We want to encourage the Regions to provide comment letters as required under Section 271.19 if a State permit condition is inconsistent with the approved State RCRA program (i.e., the conditions imposed by the State in the permit do not address, or fail to address adequately, specific authorized State requirements). We expect that in most cases, the Region will be able to work with the State to resolve the inconsistency. If, however, the State issues the final permit without including the requirement commented on by EPA, the Agency has the right to enforce the State law requiring that condition pursuant to 40 CFR Section 271.19(e)(2).

The comment letters must be written and submitted to the State during the comment period of the draft permit in order for EPA to preserve its right in the future to take action to enforce the State requirements that the draft permit fails to adequately address. The letter also serves to advise the State as to how EPA believes the permit could be modified so that a facility complying with the permit also would comply with the identified State requirements. If a State drafts a permit and EPA does not submit a comment letter pursuant to Section 271.19, then, after the final permit is issued, EPA is estopped from taking an enforcement action against that facility for a violation of a requirement that is not a condition of the permit (even if the facility is in violation of State law). This is commonly referred to as "permit-as-shield," pursuant to 40 CFR Section 270.4(a).

The comment letters must be carefully worded because EPA's position is that the letters are not final agency actions, but merely preliminary interpretations of State law. The letters do not by themselves impose any requirements on the facility. The sole effect of the letter, with one possible exception noted below, is to preserve EPA's ability to enforce underlying State requirements against State-issued permit holders. Thus, the letters are merely preliminary enforcement interpretations, not rising to the level of even a notice of violation.

It is, therefore, important to remember several things in drafting the comment letters. First, EPA is not enforcing the comments (on the permit) contained in the comment letter. EPA, in issuing a Section 3008(a) action subsequent to permit issuance, will be enforcing the State laws that are identified in the letter which are equivalent to the Federal laws.[1]

Second, because EPA will be enforcing State laws, the comment letters should cite the equivalent authorized State laws. The letters should indicate why EPA believes that the facility would not comply with the State requirement even if the facility complies with the terms of the draft permit.

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[1] Recent judicial and administrative decisions support the position that EPA can enforce State law. See Conservation Chemical Co. of Illinois v. EPA, 660 F. Supp. 1236 (N.D. Ind. 1987), and In the Matter of CID-Chemical Waste Management of Illinois, Inc. (Appeal No. 87-11) (indicating that authorized State programs, including the regulations issued to implement such programs, are requirements of Subtitle C of RCRA within the meaning of Section 3008(a)(1), and that EPA retains authority to enforce such requirements pursuant to Section 3008(a)(2)).

Third, in the comment letter, EPA should not cite to 40 CFR Part 265 and authorized equivalent requirements. Interim status requirements do not apply to permit holders and the potential violations identified in the comment letter can be only violations of applicable permit-holder requirements.

Fourth, EPA's action in preserving its enforcement authority may be subjected to legal challenge. We are currently awaiting the outcome of such a case in Region V, which may affect many of our positions on the scope and applicability of the Section 271.19 regulations.[2] Thus, EPA should compile at the time the letter is drafted sufficient information to form an administrative record on which to defend EPA's preliminary interpretation of State requirements.

Although the letter itself is preliminary, related actions may have definite impacts on the facility and be ripe for review. Examples of such actions would be the issuance of a compliance order premised upon retained enforcement authority pursuant to the Section 271.19 letter, and off-site policy determinations under Superfund for violations of State regulations identified in the Section 271.19 letter. The Section 271.19 letter would become part of the record for these related actions. Furthermore, once EPA has taken one of these actions, the owner or operator of the affected facility may succeed in arguing that the Section 271.19 letter itself is ripe for review. Again, EPA will be in a better position to defend against these types of challenges if it has prepared a record to support its finding that the permit is inconsistent with underlying State law.

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[2] In that case, Waste Management of Illinois, Inc. (WMI) has filed a motion in U.S. District Court seeking a declaratory judgment that EPA cannot impose conditions on the facility pursuant to a Section 271.19 comment letter and could not take an enforcement action based upon comments in such a letter. The suit also claims that the Section 271.19 procedure violates WMI's rights to due process under State and Federal law. EPA has not yet taken an enforcement action, although Region V has written a letter commenting on the draft permit, pursuant to Section 271.19. The State responded by providing a contrary interpretation of State requirements and by issuing the permit containing the terms of the draft. EPA has claimed that WMI's challenge of EPA's potential exercise of enforcement authority to enforce State law after comment pursuant to Section 271.19 is not ripe for judicial review, and may not be ripe until EPA has initiated an enforcement action against WMI.

In the off-site policy example, a Section 271.19 letter may be needed to establish that a facility is ineligible to receive wastes under the off-site policy. If a facility is in compliance with its permit and no longer subject to interim status requirements, technically no violations can be enforced by EPA at the facility even though the facility may have been in violation of interim status requirements and may currently be in violation of state permitting requirements. Thus, if a 271.19 letter is not submitted, the facility may be eligible to receive off-site waste even though it is in violation of State permitting requirements (because it is in compliance with its permit).

Because of impacts on future enforcement cases and off-site determinations, the Region should, when reviewing draft permits, determine whether the permit conditions are consistent with the underlying State permit regulations, and file a timely comment letter where inconsistencies occur. After filing the comment, the Region should review both the final permit and any actions taken by the facility to comply with the identified underlying permit requirements, and should keep these reviews in mind when considering enforcement and off-site policy decisions and the facility's transition from interim to permitted status.

The above are preliminary considerations on comment letters and enforcement actions pursuant to 40 CFR Section 271.19. We will keep the Regions advised of any upcoming changes or new insights resulting from a decision in the WMI case. In the meantime, if you have any questions, please call me or contact Nancy Parkinson (OWPE, 475-9325) or Josh Sarnoff (OGC, 382-7706).

cc: Regional Counsels
Regions I-X